No. 77-6067

In the Supreme Court of the United States

OCTOBER TERM, 1978

BILLY DUREN, PETITIONER

v.

STATE OF MISSOURI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Missouri's statutory and constitutional scheme for the selection of petit jurors, which grants an automatic exemption to women based solely on sex, deprived petitioner of due process of law.

INTEREST OF THE UNITED STATES

Congress has declared, as the policy of the United States, that all litigants in the federal courts entitled

to trial by jury have the right to grand and petit juries "selected at random from a fair cross section of the community * * *." 28 U.S.C. 1861. Congress also has expressly forbidden discrimination on the basis of sex in the selection of grand or petit jurors in the federal courts. 28 U.S.C. 1862. Through operation of the Due Process Clause of the Fourteenth Amendment, the states are also constrained by the requirement of the Sixth Amendment that jurors be selected from a fair cross section of the community. *Taylor* v. *Louisiana*, 419 U.S. 522. The United States has an interest in cases involving the interpretation of the "fair cross section" rule.

In addition, Title IX of the Civil Rights Act of 1964, 78 Stat. 266, as amended, 42 U.S.C. (Supp. V) 2000h-2, provides that the Attorney General may intervene in any action in federal court that alleges a denial of equal protection of the laws on account of sex and that the Attorney General certifies is of general public importance. The United States has been permitted to intervene in actions alleging discrimination in jury selection.[1] Although petitioner asserts that his right to due process of law has been denied through underrepresentation of women on the petit jury panel, equal protection principles are involved in the requisite determination whether petitioner has established a *prima facie* case.

STATEMENT

1. Petitioner was indicted in the Circuit Court of Jackson County, Missouri, for first degree murder

[1] See, *e.g.*, *Turner* v. *Spencer*, 261 F. Supp. 542 (S.D. Ala.).

and first degree robbery (Pet. App. A1). Prior to trial, petitioner moved to quash the petit jury panel on the ground that women were systematically excluded from jury service. After a hearing, the trial judge denied the motion (*id.* at A2). Petitioner was then tried and convicted by an all-male jury (*id.* at A7). Following his trial, petitioner moved for a new trial, again alleging that he had been denied due process because of the systematic underrepresentation of women on the jury panel. The court denied the motion and sentenced petitioner to two terms of life imprisonment (*id.* at A1).

Petitioner appealed his conviction to the Missouri Court of Appeals, Kansas City district, which transferred the case to the Missouri Supreme Court pursuant to Art. 5, § 3, Mo. Const., as amended (1976) (Pet. App. A1). That court affirmed the conviction on September 27, 1977, and denied a motion for rehearing on October 11, 1977.

2. The State of Missouri grants women an automatic exemption from jury service solely on the basis of sex under Art. 1, § 22(b), Mo. Const.,[2] and Mo. Ann. Stat. § 494.031(2) (Supp. 1978).[3] Women were entirely excluded from jury service in Missouri

[2] "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

[3] "The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit; * * * (2) Any woman who requests exemption before being sworn as a juror; * * *"

until 1945, when the present version of Art. 1, § 22 (b), Mo. Const., was adopted.

Pursuant to statute, Mo. Ann. Stat. § 497.130 (Supp. 1978), prospective jurors in Jackson County are mailed a questionnaire that contains the following notice:

> TO WOMEN:
>
> The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.
>
> I elect not to perform jury service.
>
> _____
>
> (Signature)

The questionnaire also includes questions designed to elicit the sex of the respondent and directing attention to the exemption for women.[4]

At the hearing on his pre-trial motion to quash the jury panel, petitioner presented the testimony of John Fitzgerald, a Jackson County Jury Commissioner. Fitzgerald testified that questionnaires are sent to potential jurors randomly selected from Jackson County voter registration lists and that questionnaires returned showing no exemption and those not returned are placed on the jury wheel (Pet. App. A7). Each week names are randomly selected from the wheel to be sent summonses for jury service. The summons reads in part:

> Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible.[5]

If a woman fails to respond to the summons, the jury commissioners assume that she has exercised her option not to serve (*ibid.*).

Petitioner also introduced statistical evidence concerning the percentages of women appearing for service on Jackson County jury panels for the period of June 1975 through March 1976. This evidence, which was not contested by the State, revealed the following percentages of women reporting for jury service: June 1975—15 percent; July 1975—15.1 percent; August 1975—13 percent; September 1975—13.7 percent; October 1975—10.9 percent; January 1976—12.3 percent; February 1976—17.6 percent; March 1976—15.5 percent. The proportion of women over the entire period averaged 14.5 percent. Petitioner's venire of 53 included five women, or only 9.4 percent. His jury of 12 was all male (Pet. App. A7).

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[4] "(1) Please state your sex. Male ( ) Female ( ) (If you are female and do not wish to serve, see bottom of questionnaire) * * *.

"(7) If you are a female * * * then under the law of Missouri, you cannot be compelled to serve as a juror, so state if you will serve. Yes ( ) No. ( )."

Other exemptions are not similarly emphasized. The only other notice of exemption is directed to "men over 65."

[5] Men seeking exemption from jury service are informed by this summons that they must make application to the judge for "sufficiently valid reasons" by the Thursday before their appearance date or by personal appearance before the judge.

At the hearing on his motion for a new trial, petitioner introduced evidence indicating that the 1976 jury wheel for Jackson County was 29.1 percent women (Pet. App. A7). Petitioner also introduced data from the 1970 Census showing that the population of Jackson County over the age of 21 was 54 percent women (*id.* at A6). This evidence again was not rebutted by the State.

3. In affirming petitioner's conviction, the Missouri Supreme Court held that the automatic exemption of women from jury service violated neither due process nor equal protection. The court asserted that the right of women in Missouri to serve on juries was not restricted, since they were merely granted a "privilege" not to serve (Pet. App. A5-A6). Discussing at length the facts in *Taylor* v. *Louisiana*, 419 U.S. 522, the court distinguished *Taylor* on two grounds: (1) Missouri did not require women to volunteer for jury service, and (2) the figures of 29.1 percent women on the Jackson County jury wheel and 14.5 percent women appearing for jury duty were "dramatically higher" than the relevant percentages for St. Tammany's Parish, Louisiana (Pet. App. A6-A7).[6]

The Missouri Supreme Court also questioned the validity of petitioner's statistics, even though the State had declined to introduce any evidence at either of the two hearings in the trial court. In particular,

[6] The jury wheel of St. Tammany's Parish included no more than 10 percent women and less than 1 percent of the jurors summoned during a ten and a half month period were women.

the court below questioned the accuracy of 1970 census figures (Pet. App. A6) and speculated that the percentage of women appearing for jury duty might have been reduced through the operation of other exemption provisions (*id.* at A7-A8).[7] The court held that petitioner's statistics did not establish a *prima facie* case of underrepresentation of women because Missouri's sex-based exemption did not involve subjective standards or purposeful discrimination (*id.* at A8).

Finally, after acknowledging that petitioner may have lacked standing to raise the claim, the Missouri Supreme Court addressed the issue of equal protection

[7] Exemptions are provided under Mo. Ann. Stat. § 494.031 on request to those over 65, women, doctors, chiropractors, dentists, clergymen, professors and teachers, persons who have served as jurors within the preceding year, and officers or employees of government bodies.

In addition, members of the armed forces, lawyers, judges, convicted felons, and illiterates are ineligible for jury service under Mo. Ann. Stat. § 494.020 (Supp. 1978).

The validity of these exemptions for members of occupational classes is not at issue in this case. Similar exemptions have been upheld on grounds that they do not undermine a fair cross section, *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 534, and that the uninterrupted service of such occupational groups serves the public welfare. *Rawlins* v. *Georgia*, 201 U.S. 638; *United States* v. *Horton*, 526 F.2d 884 (C.A. 5), certiorari denied, 429 U.S. 820 (sole proprietors); *United States* v. *Test*, 550 F.2d 577 (C.A. 10) (sole proprietors); *Government of the Canal Zone* v. *Scott*, 502 F.2d 566 (C.A. 5) (military personnel); *United States* v. *Catena*, 500 F.2d 1319 (C.A. 3), certiorari denied, 419 U.S. 1047 (practicing physicians); *United States* v. *Ross*, 468 F.2d 1213 (C.A. 9), certiorari denied, 410 U.S. 989 (students).

(Pet. App. A9).[8] The court held that the State's jury selection system did not deny equal protection because there was no absolute exclusion of women and no "subjective discriminatory treatment" (*id.* at A10). Neither men nor women were found to suffer a constitutionally impermissible denial of equal protection as a result of the sex-based "privilege" (*ibid.*).

SUMMARY OF ARGUMENT

Missouri's automatic exemption of women from jury service on request violates the "fair cross section" requirement of the Sixth Amendment, applicable to the states under the Due Process Clause of the Fourteenth Amendment. The uncontradicted evidence presented by petitioner clearly established a substantial underrepresentation of women on the jury panels of the Jackson County Circuit Court. The trial court and the Missouri Supreme Court erred in holding that petitioner had failed to establish a *prima facie* case of underrepresentation of women.

Because the sex-based exemption appeared on the face of the statutes, petitioner had no obligation to establish that the percentage of women was reduced by the operation of subjective discriminatory standards. Petitioner has standing to raise the argument that the systematic underrepresentation of women on the Jackson County juror panels violates the Sixth

[8] The petition for a writ of certiorari presents no equal protection question.

and Fourteenth Amendment requirement that jurors be selected from a fair cross section of the community.

Under the Missouri system, the sex-based exemption provision operates at two levels: (1) before the jury wheel is drawn up, when women claim the exemption in response to the prominent notice on the questionnaire, and (2) prior to the appearance of jurors for service, when women are afforded an additional opportunity to refuse service by returning the summons or by simply not reporting for jury duty. Both these stages are equally effective in eliminating women from jury panels, each successively halving the percentage of women. The full effect of Missouri's sex-based exemption provision can therefore only be measured after it has completed its operation, when jurors report for jury duty.

In the absence of any contradictory evidence, the proof presented by petitioner was sufficient to establish a *prima facie* case of a violation of the fair cross section rule. Petitioner carried the burden of proving the existence of a sex-discriminatory juror selection process, the percentage of women in the county population, and the percentage of women on the jury wheel and reporting for jury duty over a substantial and relevant time period. In the absence of any evidentiary showing by the State either that petitioner's statistics were faulty or that the gross underrepresentation of women on the jury panels resulted from neutral causes other than the sex-based exemption provision, the State failed to meet its burden of rebutting petitioner's *prima facie* case.

By holding erroneously that petitioner had failed to make a *prima facie* case, the Missouri Supreme Court avoided the question whether any adequate state interest justified the discrimination. Because the right to a jury selected from a fair cross section of the community is fundamental under the Sixth Amendment, the State must advance substantial reasons to support the automatic exemption of women. The only conceivable state interests, stereotyped notions concerning women's role in the home or sensibilities and administrative convenience, do not satisfy this standard.

ARGUMENT

I

THE ABSOLUTE EXEMPTION OF WOMEN FROM JURY SERVICE ON REQUEST UNDER MISSOURI LAW VIOLATES THE "FAIR CROSS SECTION" REQUIREMENT OF THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. The State's Blanket Exemption of Women Contravenes the Legal Principles Set Out in *Taylor* v. *Louisiana*

The State's automatic exemption of women from jury service solely on the basis of sex squarely violates the "fair cross section" rule as interpreted by this Court in *Taylor* v. *Louisiana*, 419 U.S. 522. *Taylor* held that the requirement that jurors be selected from a fair cross section of the community is fundamental to the jury trial guaranteed by the Sixth Amendment, as applied to the states through the Due

Process Clause of the Fourteenth Amendment. *Id.* at 530.[9] This Court also recognized that women comprise an identifiable group whose exclusion from or systematic underrepresentation on jury panels raises a substantial question under the fair cross section rule. *Id.* at 531. A criminal defendant who is male has standing to argue that the underrepresentation of women violates the fair cross section rule and denies him due process. *Id.* at 526. An exemption granted to women solely on the basis of sex must be justified by the state on more than rational grounds and cannot be upheld merely for reasons of women's presumed household obligations or administrative convenience. *Id.* at 534, 535. This Court held it impermissible for states to grant "automatic exemptions based solely on sex" if the result is jury venires that are "almost totally male." *Id.* at 537.

The Louisiana exemption of women from jury duty that this Court struck down in *Taylor* resembled Missouri's provision, but it operated at an earlier

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[9] The concept of a constitutional right to a jury selected from a fair cross section of the community first evolved in the context of equal protection challenges to the systematic exclusion of racial groups. See *Smith* v. *Texas*, 311 U.S. 128; *Hernandez* v. *Texas*, 347 U.S. 475. The requirement was then imposed on the federal courts pursuant to the supervisory powers of this Court. *Glasser* v. *United States*, 315 U.S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Ballard* v. *United States*, 329 U.S. 187. The fair cross section rule was eventually perceived as an essential element of the Sixth Amendment right to a jury trial, *Williams* v. *Florida*, 399 U.S. 78, applicable to the states under *Duncan* v. *Louisiana*, 391 U.S. 145.

stage in the juror selection process. Under Louisiana law,[10] a woman was required to file a written declaration of her willingness to perform jury service or her name would not be placed on the jury wheel. The result in St. Tammany's Parish was that less than ten percent of the persons on the 1972 jury wheel and less than one percent of the names drawn to sit on jury venires during the relevant period were female.

In an attempt to distinguish *Taylor*, the Missouri Supreme Court emphasized that no affirmative duty to register is imposed on women in Missouri since those who wished to serve on a jury need only decline to invoke the automatic exemption (Pet. App. A10). Regardless of the possible relevance of that point to an equal protection challenge raised by a potential female juror, it is without significance in the context of an asserted violation of the fair cross section requirement and the due process rights of a criminal defendant. The question before this Court does not

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[10] La. Const., Art. VII, § 41 read in pertinent part:

"The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service."

La. Code Crim. Proc. Ann., Art. 402 (1967) provided:

"A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

These provisions were repealed effective January 1, 1975.

concern the relative burdens on female and male potential jurors or the particular discriminatory mechanism by which a cognizable group is reduced or eliminated, but rather petitioner's right to have jurors on his venire selected from a fair cross section of the community. Missouri's facially discriminatory exemption for women reduces this large distinctive class by three-quarters to a small minority of jurors.

The court below also attempted to restrict *Taylor* to its narrow factual context, holding in essence, as the dissent stated, that "anything more than one percent women is constitutional" (Pet. App. A16). But *Taylor* held that if women are "systematically eliminated from jury panels" by means of a sex-based exemption from jury service, there is a violation of the Sixth Amendment's fair cross section requirement. 419 U.S. at 531. The Court remarked (*id.* at 538) that

> jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

The rationale of this decision is not limited to the facts only as they existed in St. Tammany's Parish, Louisiana. The opinion disapproves any juror selection system that treats women as a class (419 U.S. at 535) and plainly intended no difference between those, such as Louisiana's, that granted females an

"exclusion" and those, such as Missouri's, that accord women an "exemption" (*id.* at 537):

> [I]t is no longer tenable to hold that women as a class may be excluded or *given automatic exemptions based solely on sex* if the consequence is that criminal jury venires are almost totally male. [Emphasis added.]

Whatever the terminology employed or the details of the system devised to reach that result, jury panels averaging more than 85 percent men that predictably lead to all-male petit juries such as that which convicted petitioner are "almost totally male" and fail to be reasonably representative of the community, within the essential meaning of *Taylor*. This reduction of an easily identifiable, distinctive and large community group to an insignificant minority of jurors through the application of a discriminatory exemption provision contravenes the fair cross section rule.[11]

Following this Court's decision in *Taylor*, most states that provided automatic exemptions of women from jury service eliminated those exemptions either

[11] This Court recognized long ago that the presence of women on juries imparts "a flavor, a distinct quality" that may affect the "subtle interplay of influence" in jury deliberations. *Ballard* v. *United States, supra*, 329 U.S. at 193, 194. The Court took notice in *Taylor* (419 U.S. at 532 n. 12) of controlled studies of women as jurors that indicated the existence of "their own perspectives and values * * *." Such perspectives may be lost through submergence in an overwhelming male majority as well as by total exclusion.

by legislative [12] or judicial [13] action. Only the states of Missouri and Tennessee continue to provide women with automatic exemptions based solely on sex, and the Tennessee Supreme Court has recently termed the exemption "highly suspect" from a constitutional standpoint. *Scharff* v. *State*, 551 S.W.2d 671, 676.[14] The Missouri Supreme Court thus stands alone in upholding without reservation the constitutionality of automatic exemptions of women from jury duty, despite the clear constitutional guidelines announced in *Taylor*.

[12] Ga. Code Ann. § 59-124 (1965), repealed by Ga. Acts 1975, pp. 779-780; N.Y. Jud. Law § 599 McKinney, repealed by 1975 N.Y. Laws, ch. 4 § 3; R.I. Gen. Laws Ann. § 9-9-11 (1970), repealed by 1975 R.I. Laws, ch. 233, § 1.

A number of states have also recently replaced exemptions for mothers of minor children with sex-neutral excuses for persons with child-care responsibilities. Alaska Stat. § 09.20.030 (1973); Conn. Gen. Stat. Ann. § 51-219 (Supp. 1978); Mass. Gen. Laws Ann. ch. 234, § 1 (1974); Mont. Rev. Codes Ann. § 93-1304 (Supp. 1977); N.J. Stat. Ann. § 2A-69-2(g) (1976); N.Y. Jud. Laws § 599(7) McKinney; Okla. Stat. Ann. tit. 38, § 28 (Supp. 1977); Utah Code Ann. § 78-46-10 (1977); Va. Code Ann. § 8-208.6(26) (Supp. 1976).

[13] *People* v. *Moss*, 80 Misc.2d 633, 366 N.Y.S.2d 522; *State* v. *Gethers*, 139 Ga. App. 1, 227 S.E.2d 832.

[14] The Tennessee Supreme Court did not reach the question whether the automatic exemption violated the fair cross section rule because the criminal defendant had neglected to make any record concerning the effects of the statute and thus had not made a *prima facie* case. The opinion expressed regret that the state of the record precluded a decision on the merits and noted that "a continuing invitation to appellate review is presented by the unresolved status of woman jurors" post-*Taylor*. 551 S.W.2d at 676.

B. Petitioner Need Not Prove that the Discrimination was Subjective When the Juror Selection System was Facially Discriminatory

The Missouri Supreme Court attempted to distinguish *Turner* v. *Fouche*, 396 U.S. 346, and *Castaneda* v. *Partida*, 430 U.S. 482, on the grounds that those cases dealt with juror selection systems utilizing subjective criteria, resulting in the underrepresentation of racial or ethnic groups (Pet. App. A5, A8). In those cases, however, the surrounding circumstances supplied what the Missouri statute provides on its face: proof of class-based distinctions in jury selection. Had the statutes in *Turner* or *Castaneda* explicitly based jury selection on race or national origin, this Court would have disapproved them without any need to analyze other factors in the jury selection process. The fact that Missouri's sex-based provision is obvious and objective rather than subtle and subjective heightens rather than lessens the need for close constitutional scrutiny, especially when it results in the systematic underrepresentation of women in violation of the fair cross section rule. Louisiana's exemption for women in *Taylor* v. *Louisiana*, *supra*, also appeared on the face of the state's jury laws, but this Court nevertheless found a constitutional violation.

Because *de jure* racial discrimination in the selection of jurors has long been clearly illegal and a federal criminal offense since 1875,[15] it is not surprising that those cases dealing with the fair cross section

[15] 18 U.S.C. 243. See also *Strauder* v. *West Virginia*, 100 U.S. 303.

rule as applied to racial groups have concerned juror selection systems using more subtle discriminatory devices such as the "key man," [16] good character requirements,[17] peremptory challenges,[18] or selection from an unrepresentative pool.[19] The rule derived from these cases is that once a criminal defendant has made a *prima facie* showing that a large, distinctive group in the eligible population is substantially underrepresented in the juror pool, he need only show that there has been an opportunity for discrimination or that non-neutral factors have been employed. *Alexander* v. *Louisiana*, 405 U.S. 625, 630; *Castaneda* v. *Partida*, *supra*, 430 U.S. at 494. The burden then shifts to the state to attempt to explain that the disparity was caused by non-discriminatory reasons.

Missouri's automatic exemption for women solely on the basis of sex is just such a non-neutral factor that has resulted in a severe underrepresentation of women on Jackson County juror panels. This sex-based exemption appears on the face of the Missouri constitutional provision and implementing statute, is emphasized on the juror questionnaire and juror summons, and is applied by the Jury Commissioner and the state courts. As *Taylor* conclusively indicates, the

[16] *Cassell* v. *Texas*, 339 U.S. 282; *Castaneda* v. *Partida*, *supra*.

[17] *Hill* v. *Texas*, 316 U.S. 400; *Carter* v. *Jury Commission*, 396 U.S. 320; *Turner* v. *Fouche*, *supra*.

[18] *Swain* v. *Alabama*, 380 U.S. 202.

[19] *Whitus* v. *Georgia*, 385 U.S. 545.

fair cross section rule is violated by this type of explicit discrimination as well as by more subtle means.

C. Petitioner's Evidence Met the Standards for Establishment of a *Prima Facie* Case

The evidence presented by petitioner in the trial court revealed how Missouri's sex-based exemption, under Article 1, § 22(b) of the Missouri Constitution and its implementing statute, Mo. Ann. Stat. § 494-.031(2), provides for a two-stage process of elimination of women from juror pools. While the initial selection of potential jurors is made at random from voter registration lists, the questionnaire sent to those selected from the lists prominently features an invitation to women to excuse themselves from jury service. The effectiveness of this offer is reflected in statistics showing that the 1976 jury wheel included only 29.1 percent women, although the county's adult population was 54 percent female. Even more effectively reducing the number of women jurors was the second opportunity to claim the sex-based exemption by return of the juror summons, which also pointedly advised women of the automatic exemption. Adding to this reduction was the Jury Commissioner's practice of construing a woman's failure to report for jury duty as a claim of the sex-based excuse.[20] Petitioner demon-

[20] Under Missouri law, persons failing to report for jury service are subject to arrest and fine for contempt. Mo. Ann. Stat. § 494.080 (1952). The Jury Commissioner testified that when women failed to appear he assumed that they had claimed an exemption whether or not they had returned the summons.

strated that this second operation of the discriminatory exemption dramatically reduced the number of women on jury panels to a mere 14.5 percent during the nine-month period preceding his trial. The predictable result is a large number of all-male petit juries, such as the one that tried and convicted petitioner.

The full impact of the sex-based exemption here is even more strikingly demonstrated by measuring the effect of the system in terms of the actual number of jurors affected. If Missouri utilized a neutral juror selection system, the percentage of women on jury panels could be expected to approximate the percentage of women in the eligible population, 54 percent. The difference between such a non-discriminatory system and Missouri's present system would average 20 persons on a jury panel of 50 members—*i.e.*, 20 persons on an average Jackson County juror panel of 50 who are now men would be replaced by women under a fair, non-sex-based juror selection plan. On an average petit jury of 12, five persons who are now men would be replaced by women. Such a difference is highly significant and persuasively demonstrates that Missouri's juror selection scheme violates constitutional standards.[21]

[21] Of course, even under a neutral selection system the number of men and women on actual jury panels and petit juries would not always mirror the eligible population. "Defendants are not entitled to a jury of any particular composition * * *." *Taylor* v. *Louisiana, supra,* 419 U.S. at 538.

The disparity in Missouri between the percentage of women in the eligible population and that of women in the jury wheel and reporting for jury service equals or exceeds the levels of underrepresentation found unconstitutional in other jury discrimination cases. The percentage of women was reduced in this case by approximately three-quarters, from 54 percent of the eligible population to a mere 14.5 percent of jury panels. This Court has found unconstitutional reduction of 79 percent to 39 percent,[22] of 20 percent to 7 percent,[23] of 60 percent to 37 percent,[24] and of 27.1 percent to 9.1 percent [25] of a large and distinctive group.[26] In *Castaneda* v. *Partida*, *supra*, 430 U.S.

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[22] *Castaneda* v. *Partida*, *supra*, 430 U.S. at 496.

[23] *Alexander* v. *Louisiana*, *supra*, 405 U.S. at 629.

[24] *Turner* v. *Fouche*, *supra*, 396 U.S. at 359.

[25] *Whitus* v. *Georgia*, *supra*, 385 U.S. at 552.

[26] Courts have generally been reluctant to expand the list of "cognizable" or "identifiable" groups in the community beyound categories of race, ethnic groups with a history of discrimination, and sex. A number of cases have held that young persons are not a cognizable group, being diverse in interests and outlook and lacking internal cohesion. *United States* v. *Potter*, 552 F.2d 901 (C.A. 9); *United States* v. *Kirk*, 534 F.2d 1262 (C.A. 8); *United States* v. *Olson*, 473 F.2d 686 (C.A. 8), certiorari denied, 412 U.S. 905; *United States* v. *Kuhn*, 441 F.2d 179 (C.A. 5). See also *Hamling* v. *United States*, 418 U.S. 87. Challenges to the use of voter registration lists as the source of jurors have generally failed because non-voters are not a cognizable group. *Murrah* v. *State of Arkansas*, 532 F.2d 105 (C.A. 8); *United States* v. *Lewis*, 472 F.2d 252 (C.A. 3); *Camp* v. *United States*, 413 F.2d 419 (C.A. 5), certiorari denied, 396 U.S. 968. Also found non-cognizable are persons of "lower economic status," *United States* v. *Greene*, 489 F.2d 1145 (C.A. D.C.), certiorari denied, 419 U.S. 977, and "lower educational level," *United States* v. *Potter*, *supra*.

at 496, a "key man" system of grand juror selection was found constitutionally defective even though a sizable 39 percent of grand jurors were Mexican-American, because the state came forward with no neutral explanation for the discrepancy between that figure and the 79 percent Mexican-American share of the eligible population. Similarly, in *Turner* v. *Fouche*, *supra*, 396 U.S. at 359, this Court held that a grand jury pool that was 37 percent black in a county with a 60 percent black population warranted a finding of unconstitutional underrepresentation, in the absence of a countervailing neutral explanation by county officials. Jury panels averaging only 14.5 percent women cannot be said to be reasonably representative of a community in which women constitute a 54 percent majority.

D. The State Failed to Bear its Burden to Rebut Petitioner's *Prima Facie* Case

It is well-settled that once a defendant demonstrates a substantial underrepresentation of a large and cognizable group and the application of non-neutral selection criteria, the burden shifts to the state to rebut the *prima facie* case of a violation of the fair cross section rule. *Castaneda* v. *Partida*, *supra*, 430 U.S. at 495; *Alexander* v. *Louisiana*, *supra*, 405 U.S. at 632; *Turner* v. *Fouche*, *supra*, 396 U.S. at 361. The State produced no evidence at either of the motions

hearings in which petitioner challenged the underrepresentation of women in the jury pool. Thus, petitioner's evidence concerning the effects of the sex-based exemption is uncontradicted. Nevertheless, the Missouri Supreme Court held that petitioner had failed to establish a *prima facie* case because he had not conclusively demonstrated that no other possible factors contributed to the elimination of women. The court below stated that petitioner had not shown that the percentage of women on the 1976 voter registration list was the same as that reflected in the 1970 Census (Pet. App. A6)[27] and that petitioner had not proven that women do not disproportionately claim other exemptions allowed by Missouri law (*id.* at A7, A8).[28]

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[27] Petitioner's brief points out that there is almost no difference between the voter registration rate of Missouri women (69.9 percent) and men (71.1 percent) (Pet. Br. 4 n. 2).

[28] There is practically no possibility that the disparity between male and female representation on jury panels in Missouri could have been caused by the operation of the other exemption provisions. Almost all of the exempted occupations in Missouri are predominantly male: physicians and osteopaths (7.69 percent female), chiropractors (15.33 percent female), dentists (3.92 percent female), clergymen (2.74 percent female), professors (30.7 percent female), lawyers (3.84 percent female), and judges (9.07 percent female). Only teachers are predominantly female (73.76 percent), and they comprise only 2.65 percent of the adult female population. Government officers and employees are 45 percent female, while women make up just 5.2 percent of the armed forces. A larger percentage of the male (1.1 percent) than female (1.0 percent) population is illiterate. The relatively small percentage of female felons is reflected in statistics for persons incarcerated in 1973 in state prisons (3.08 percent female) and for persons in custody in all correctional institutions in 1970 (3.38 percent female). While 58.7 percent of persons over 65 are female, this could hardly account for the disproportionate share of female jurors in Jackson County since there is not a large difference between the percentage of the total female (16.68 percent) and total male (13.18 percent) population that is over 65. The Jackson County juror questionnaire and summons specifically direct this exemption "to men over 65." Bureau of the Census, *Statistical Abstract of the United States 1977*, Table 221, p. 138, Table 585, p. 367; Bureau of the Census, *Population Profile of the United States: 1977*, Series P-20, No. 324, Table 22, p. 40; U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: A Databook*, Bulletin 1977, Table 5, p. 7; Bureau of the Census, *1970 Census of Population, Characteristics of the Population, Part 27: Missouri*, Table 20, p. 70, Table 171, p. 695; Bureau of the Census, *Persons in Institutions and Other Group Quarters, 1970 Census of Population* (Subject Report PC (2) 4-E), Table 3, p. 5; U.S. National Criminal Justice Information and Statistics Service, *Census of Prisoners in State Correctional Facilities, 1973* (Special Report No. SD-NPS-SR-3, December 1976).

Here, as in *Castaneda* v. *Partida, supra*, 430 U.S. at 498, "[i]nexplicably, the State introduced * * * no evidence." In the absence of any rebuttal evidence by the state, this Court previously has found it proper to assume that the percentage of the cognizable group measured by the 1970 Census fairly reflects the percentage of that group in the eligible population. *Id.* at 488 n. 8.[29] See also *Alexander* v. *Louisiana, supra*,

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[29] In *Castaneda*, the state argued that the county had experienced population shifts, that the census counted illegal aliens, and that Mexican-Americans were disproportionately illiterate and thus ineligible for jury service. These arguments failed because they were not proven by competent evidence. 430 U.S. at 499.

405 U.S. at 627. Missouri thus had the burden to produce evidence concerning population shifts that might have undermined the presumptive reliability of the 1970 Census or evidence of differential rates of voter registration among the sexes. The Missouri Supreme Court nonetheless impermissibly burdened petitioner with the obligation—requiring him to prove a negative, *i.e.*, that no other imaginable factor contributed to the demonstrated disproportionate elimination of women from the jury pool—and held that his failure to discharge the burden was fatal to his *prima facie* case.

If the State believed that neutral factors rather than the sex-based exemption had contributed to the underrepresentation of women,[30] it had ample oppor-

[30] The State has suggested that the 14.5 percent figure of women on jury panels could have resulted from chance (Br. in Opp. 8). This Court has previously taken note of certain statistical methods for measuring the probability of such underrepresentations. *Castaneda* v. *Partida, supra*, 430 U.S. at 496 n. 17. The first step is to compute the standard deviation, which measures predicted fluctuations from the expected value. (Here, the square root of the product of the total sample of jurors reporting for service (5119) times the probability of selecting a woman (.54) times the probability of selecting a man (.46) results in a standard deviation of 36). The Court noted in *Castaneda* that if the difference between the expected value and the observed number is greater than two or three times the standard deviation, then the randomness of the jury selection is highly suspect. In this case the difference between the expected (2764) and observed (741) numbers of women reporting for jury service was 2023, or approximately 56 standard deviations. The probability that this extreme divergence resulted from chance is thus infinitesimal. The Court described as "negligible" the likelihood that a much less extreme situation in *Castaneda* (12 standard deviations) had resulted from chance. 430 U.S. at 497 n. 17. See also *Whitus* v. *Georgia, supra*, 385 U.S. at 552 n. 2; *Alexander* v. *Louisiana, supra*, 405 U.S. at 630 n. 9.

tunity to offer proof at the two motions hearings. Having failed to do so, it may not now challenge the reliability of petitioner's statistics. It was likewise impermissible for the Missouri Supreme Court to speculate that women may have claimed other exemptions disproportionately in the absence of any evidence thereof and to hold that petitioner's *prima facie* case was rebutted by such speculation. As this Court stated in *Castaneda* v. *Partida, supra*, 430 U.S. at 499:

> These are questions of disputed fact that present problems not amenable to resolution by an appellate court. * * * [W]e are not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case.

Because petitioner established a *prima facie* case of underrepresentation of women that the State did not rebut, a violation of the fair cross section rule has been shown.

II

NEITHER WOMEN'S PRESUMED FAMILY ROLE NOR ADMINISTRATIVE CONVENIENCE IS AN ADEQUATE REASON TO JUSTIFY A VIOLATION OF THE "FAIR CROSS SECTION" RULE

Although the Missouri Supreme Court cited no interest of the State that might be advanced to support

the automatic exemption of women from jury service, it alluded to the fact that exemptions from jury duty are generally intended "to promote the orderly and efficient operation of overloaded judicial systems" (Pet. App. A4). *Taylor* v. *Louisiana*, *supra*, established, however, that a state must assert more than merely rational reasons to justify a juror selection system that results in the substantial underrepresentation of a large and cognizable group. 419 U.S. at 534. *Taylor* specifically held that an exemption of women solely on the basis of sex could not be justified by women's "presumed role in the home" or by administrative convenience. 419 U.S. at 534-535:

> It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials. [Emphasis in original; footnote omitted.]

The Court also took judicial notice of statistics concerning the labor force participation rates of women, statistics that "put to rest the suggestion that all women should be exempt from jury service based solely on their sex * * *." *Id.* at 535 n.17. The trends

noticed by this Court have continued apace,[31] undermining whatever reasons might have existed in the past to justify Missouri's automatic exemption.

If Missouri is reluctant to require jury service by women with full-time child-care responsibilities, there are available less sweeping means for exempting that relatively small minority of women. Numerous states [32] and federal judicial districts [33] have adopted

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[31] In March 1976, the month of petitioner's trial, 46.1 percent of women with children under 18 and 37.4 percent of women with children under 6 were in the work force. Only a small minority of women, 19.39 percent, both had children under 18 and were not in the work force. U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: A Datebook*, Bulletin 1977, Tables 19, 22. The labor force participation rate for Missouri women in 1975 was 52.89 percent. Bureau of the Census, *Money Income and Poverty Status in 1975 of Families and Persons in the United States and the North Central Region*, Series P-60, No. 111, April 1978, Table 12B.

[32] See note 12, *supra*.

[33] The federal district courts, subject to approval by a reviewing panel of the relevant circuit, are required to promulgate juror selection plans under the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* The statute explicitly requires that jurors be selected at random and from a "fair cross section" of the community. 28 U.S.C. 1861. Such plans may specify groups of persons whose members may be automatically excused on individual request because service would cause extreme inconvenience or undue hardship. 28 U.S.C. 1863(b)(5). Nineteen districts have sex-neutral child-care exemptions: N.D. Alabama, Arizona, N.D. California, Colorado, District of Columbia, S.D. Florida, N.D. Indiana, W.D. Kentucky, Massachusetts, W.D. Michigan, E.D. Missouri, New Hampshire, N.D. New York, W.D. New York, Oregon, E.D. Pennsylvania, M.D. Tennessee, E.D. Wisconsin, W.D. Wisconsin. Almost all of these sex-neutral exemptions were added

juror selection plans with sex-neutral exemptions for persons with child-care obligations. Many other states and federal district courts consider individual claims of hardship from parents whose presence in the home is required, under general hardship excuse statutes.[34]

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by amendment after this Court's decision in *Taylor*, replacing child-care exemptions restricted to "women" or "mothers" with children below a specified age.

While 65 federal districts retain child-care exemptions restricted to women, there is a recognized trend toward non-sex-based exemptions. The prevalence of the sex-based child-care exemption is partly explained by the suggestion in the Senate (S. Rep. No. 891, 90th Cong., 1st Sess. 28 (1967)) and House (H.R. Rep. No. 1076, 90th Cong., 2d Sess. 11 (1968)) reports that "mothers with young children" might be a suitable class under Section 1863(b)(5) for hardship excuse. This legislative history predates this Court's opinion in *Taylor*. In any event, there is no indication that such child-care exemptions disproportionately eliminate women from federal jury panels. Prior to a 1977 amendment, the juror selection plan for the District of Oregon limited its child-care excuse to women but nevertheless had a larger percentage of women on its jury panels (52.1 percent) than in the district's population (51.9 percent). *United States* v. *Armsbury*, 408 F. Supp. 1130 (D. Ore.).

[34] Most states have no specific child-care exemption, providing instead a general hardship excuse allowing individual requests. See, *e.g.*, Ala. Code § 12-16-5 (1975); Ariz. Rev. Stat. § 21-315 (1975); Ark. Stat. Ann. § 39-107 (Supp. 1975); Cal. Civ. Proc. Code § 200 (West Supp. 1978); Colo. Rev. Stat. § 13-71-112 (1973); Del. Code Ann. tit. 10, § 4529 (1974); Idaho Code § 2-212 (Supp. 1977); Ind. Code Ann. § 33-4-5.5-15 (1975); Iowa Code § 607.3 (1975); Kan. Stat. Ann. § 43-155 (1973); La. Code Crim. Pro. Ann. art. 783 (Supp. 1978); Me. Rev. Stat. Ann tit. 14, § 1213 (Supp. 1977); Mich. Stat. Ann. § 27A.1320 (1976); Miss. Code Ann. § 13-5-23 (Supp. 1976); Neb. Rev. Stat. § 25-1601 (1975); Nev. Rev. Stat. § 6.030 (1977); N.M. Stat. Ann. § 19-1-2 (Supp. 1975); N.C. Gen. Stat. § 9-6 (1969); N. D. Cent. Code Ann. § 27-09.1-11 (1974); Ohio Rev. Code Ann. § 2313.16 (1954); Ore. Rev. Stat. § 10.050 (Supp. 1975); Pa. Stat. Ann. tit. 17, § 1301.11 (Supp. 1978); R.I. Gen. Laws § 9-10-9 (1970); Vt. Stat. Ann. tit. 12 App. VII, Pt. 1, R. 28 (1973); Wash. Rev. Code Ann. § 2.36.100 (1961); W. Va. Code Ann. § 52-1-2 (1966); Wis. Stat. Ann. § 255.02 (1971).

The following federal judicial districts also provide only a general hardship provision: Guam, E.D. Kentucky, E.D. Michigan, N.D. Mississippi, E.D. North Carolina, M.D. North Carolina, Vermont, E.D. Washington.

Section 11 of the Uniform Jury Selection and Service Act (Uniform Laws Ann. 1975) also provides only a general hardship excuse requiring an individual showing of need or inconvenience. There is no reason to believe that a reasonable child-care exemption or a general hardship provision would violate the fair cross section rule through disproportionate elimination of women or any other sizable and distinctive group.[35] Substantial reasons could be ad-

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[35] Only 16.84 percent of women in March 1976 had children under the age of 13 and were not in the work force. *U.S. Working Women, supra*, Table 19.

An example of the change in jury composition that results when an automatic exemption for women is replaced by a sex-neutral child-care exemption is the experience of Erie County, New York. In 1974, when an automatic exemption for women solely on the basis of sex was still available, only 10 percent of jurors were women. Following the repeal of the automatic exemption (N.Y. Jud. Law § 599), the implementation of a computerized system of juror selection from registered voter lists, and the enactment of a sex-neutral child-care exemption (N.Y. Jud. Law § 599(7)), the proportion of women jurors rose dramatically. From January through June 1976, women comprised 49.7 percent of jurors performing service. Although a substantial majority of persons requesting the child-care excuse were women (84.6 percent), some

vanced to justify a child-care excuse tailored to cover persons actually in need of it. Child-caring is a time-consuming and responsible job analogous to the other professions whose members are granted exemptions from jury service on individual request.

In sum, neither the presumed family responsibilities of women nor the administrative convenience of avoiding individual determinations of need is a sufficient reason to justify an automatic exemption for women that violates the fair cross section rule. Although *Taylor* v. *Louisiana* permits states "to provide reasonable exemptions" from jury service, 419 U.S. at 538, a blanket exemption for women solely on the basis of sex is not reasonable, particularly where, as here, it disproportionately eliminates women from jury pools. Missouri remains free to formulate an exemption from jury service for persons whose actual presence in the home is necessary for the care of children.

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men did make successful requests. Levine and Schweber-Koren, *Jury Selection in Erie County: Changing a Sexist System*, 11 Law and Society Rev. 43 (1976).

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

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